Briefing Paper on New Institution Issues
Cynthia Koehler, Save The Bay
July 8, 1998

1. What does the ecosystem restoration implementation entity need to do? What is its job?

Basic mission of whatever entity is charged with implementing the ERP should be simple and limited: **to achieve the ecosystem restoration performance standards.** Its basic task is to implement the ERP as effectively as possible. Toward this end, the entity should have the following five tasks as a start:

A. Planner/Developer. Achieve performance standards by implementing the ERP/Strategic Plan, conduct all aspects of the restoration program -- planning through execution through monitoring through adaptive changes to plan based on monitoring.

B. Rights Holder. Be the holder of environmental rights to land and water as necessary and appropriate.

C. Contract/Grants Manager. Be capable of determining which portions of the program are best put out to bid, which best served by a grants program, or other third party options and have capacity to administer and manage.

D. A Check on Water Management Operations. Serve as the the ERP's advocate in management of the water projects on a reformulated version of what is now the Ops Group. Premise here is that the ecosystem program can only be successful if fully integrated with the water management systems.

E. Provide A Feedback Loop for the CALFED Implementation Superstructure. (We assume there will be one for the entire CALFED effort.) Report back to CALFED re progress, problems with ERP implementation as well as interface with other CALFED programs. Report back to individual regulatory agencies re success in achieving their legal mandates related to its mission. For example, the entity should be first voice of alarm if it appears that species are crashing or not achieving recovery as they should.

2. What should it not do? What is beyond its job?

A. Implementing entity should not attempt to usurp existing regulatory authority from natural resource agencies. Permitting and statutory enforcement for ESA, CW, etc. should remain with FWS/EPA/CDFG. Nor should entity be assigned any new regulatory authority.

B. Entity should not take on ESA, or other regulatory, liability (water user proposal) at least as an initial matter.

3. Why a new institution to implement the CALFED Ecosystem Restoration Program?

Neither the current CALFED structure nor any one of the individual agencies has the current capacity to carry out the eco-program effectively and efficiently. The status quo would leave the program subject to highly fragmented implementation, a serious handicap for a complex program. Moreover, the eco-program is premised on a lack of certainty about how to meet its objectives and will be subject to intense political pressure Even with a fully coherent and empowered implementing structure, the likelihood of meeting the performance standards is questionable -- without such an implementing structure, the odds are that much worse. There are several major needs that would be very difficult to fulfill under the status quo and that argue for a new institutional arrangement:

A. Need to consolidate eco-funds and authority for Central Valley and Delta restoration efforts in one place for efficient management. "Coordinating" funds that remain primarily in many different places has not produced the hoped-for efficiencies to date -- the virtual pool never materialized and is unlikely to.

B. Need for implementing body to be flexible enough to deal with different funding sources with varying requirements and restrictions. Few if any existing agencies have such flexibility -- certainly CALFED does not.

C. Need for implementing entity that has a legal existence to hire, contract, conduct transactions, etc. CALFED as currently constructed has no legal existence and cannot conduct even basic functions like hiring.

D. Need for an entity to serve as a project manager or developer with full range of development tools (except perhaps power of eminent domain which is politically volatile) buy and sell land, hold water rights, engage in water transfers, etc. While various CALFED agencies have some of these powers, all are constrained by specific programmatic mandates and few are currently authorized to use the full range of corporate flexibility that will be required for an ecosystem program of this magnitude.

E. Need for entity capable of accommodating size of the program; i.e., none of the existing agencies are prepared to undertake the restoration effort (even if they had the appropriate tools and authority). Rather than fitting the program into an existing bureaucratic structure that was not designed to deal with anything of this magnitude, the chances of success are greater if the implementing entity is designed to respond to the program.

E-026115

Political Feasibility And Program Equity

No doubt the assurance mechanisms listed above (and others not listed) peg the political infeasibility meter. But this merely reflects the difficulty of accomplishing CALFED's program with a high degree of certainty. If CALFED cannot provide such assurances for the eco-program, this must have a concomitant affect on the assurances for the water supply reliability and other program elements. If CALFED stands for a different premise -- i.e., CALFED will assure only those parts of the program as are politically feasible, but as long as the other programs are politically feasible they will go forward -- then a lasting public consensus is probably unattainable.

The political feasibility issue goes to the heart of CALFED's assumptions about what it is capable of promising to the parties. It does not appear to us that anything much less than the assurances mechanisms set forth above can reasonably be expected to assure the objectives of the ecosystem restoration program. To the extent that these or other assurances are indeed politically infeasible, we may have to face the reality that CALFED simply cannot provide more than very limited assurances that the ecosystem program will be fully implemented (let alone successful). This raises the question of whether and to what extent the water users are entitled to assurances regarding the program elements of interest to them -- the "no surprises" issue in particular.

It may be appropriate to ask the environment to take it on faith that funding, water and implementation will all occur with something less than certain assurances upfront -- but only if the water supply reliability elements are subject to: (1) the same limited assurances; and (2) a phasing structure that prevents the reliability element from going forward in the event that reasonable progress on the eco-program does not occur.

Phasing, Linkages and "Bundling"

We agree with the basic premise that all program elements are more likely to be implemented over time if they are linked with one another in a phased approach. However, recent discussions about linkages are problematic; there seems to be developing a view that progress can be measured in terms of money spent or permits issued.

The reality is that the ecosystem restoration and water supply reliability programs cannot be compared on this basis -- permits for restoration projects do not equate to permits for new reservoirs. Moreover, progress in meeting ecosystem performance standards cannot be measured in 2-year increments. Nor is it reasonable to use spending as a surrogate for meeting program goals in light of the massive amounts of money spent on eco-efforts in other areas that have failed. Phasing and linkages can be meaningful as a way of ensuring equitable program progress if we are measuring how well the program is meeting performance standards, rather than comparing how much money is spent or how many permits are issued.

Thanks for taking the time to talk with me today. I hope this is useful to you. Please do not hesitate to call if you have any questions.

E-026116